Supreme Court, U.S.
FILED

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No. 04-

IN THE

Supreme Court of the United States

JAVIER PEREZ,

Petitioner,

v.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), this Court held that an employee establishes a violation of Title VII of the Civil Rights Act of 1964 by demonstrating that he was disciplined for a job infraction when other employees of another race were not disciplined for infractions of "comparable seriousness." *Id.* at 282-83 n.11. The question presented is:

Whether an employee asserting racial discrimination in employment discipline in violation of Title VII must demonstrate more favorable treatment to other employees who engaged in "nearly identical" misconduct under "nearly identical" circumstances (as required by the Fifth, Sixth, and D.C. Circuits) or whether it is sufficient to show more favorable treatment of the employees who are "similarly situated" (as held by the Second, Third, Fourth, Eighth and Tenth Circuits)?

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OPINION BELOW

The opinion of the United State Court of Appeals for the Fifth Circuit is reported at *Perez v. Tex. Dept. Crim. Justice*, 395 F.3d 206 (5th Cir. 2004). (*See Appendix A.*) No opinion was issued by the United States District Court for the Western District of Texas.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Fifth Circuit's opinion was rendered on December 21, 2004. Respondent's Motions for Rehearing and for Rehearing En Banc were denied on February 16, 2005. (*See Appendix B*).

STATUTORY PROVISION INVOLVED

Title VII 42 U.S.C. § 2000e:

(a) Employer practices:

It shall be an unlawful employment practice for an employer–

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

. . . . . .

STATEMENT OF THE CASE

This case involves the disparate discipline imposed on one Hispanic and three Anglo employees for off-duty misconduct. Petitioner Javier Perez brought this racial discrimination case under Title VII, 42 U.S.C. § 2000e. While employed by TDCJ as a corrections officer, Perez was arrested for assault. After being informed that the criminal charges would be dismissed, TDCJ instituted an Internal Affairs Division ("IAD") investigation. Following the investigation, Perez was fired for conduct unbecoming an officer. Although three other non-Hispanic officers were charged with similar off-duty criminal conduct, they were not subjected to an internal investigation and were not fired. *See Perez v. Tex. Dept. Criminal Justice*, 395 F.3d 206, 213-14 (5th Cir. 2004).

Two of the Anglo officers, Arlen and Gary Parma, were brothers. They were accused of becoming drunk while off-duty and going to the home of an elderly man and assaulting him. *Id.* After beating the man "senseless," they left him "lying on the ground" with punctured lungs and broken ribs. (4 R 150, 153) The Parma brothers nevertheless remained employed by Respondent, with one of the brothers actually *promoted* while their indictments were pending. Respondent did *not* initiate an IAD investigation of the Parmas' incident. The brothers eventually pled guilty to lesser offenses, and continued to work for Respondent as prison guards. *See Perez*, 395 F.3d at 213-14.

Another Anglo officer, Clover, was accused of felony intoxicated manslaughter for his drunk driving accident that resulted in a death. *Id.* Like the other two Anglo employees, Clover was *not* referred to the IAD, and was given years to

work out his criminal case without any internal discipline. Like Gary Parma, he was *promoted* while was under felony indictment.[1] (4 R 159-163) He served jail time on weekends while on leave from his job guarding criminals. Like the Parmas, he escaped an IAD investigation and was not fired. (4 R 162-65).

---

1. Here is an excerpt from the warden's cross -examination at trial showing how well this Anglo employee was treated:

> Q. Okay. Now, let's talk a little bit about Shannon Clover. Are you acquainted with that gentleman?
>
> A. Yes, sir.
>
> Q. Now, did you also promote him while he was under a felony indictment?
>
> A. Yes, sir.
>
> Q. Manslaughter means where somebody dies, right?
>
> A. That's correct.
>
> Q. Okay. And knowing those two things, that he'd been drinking, got behind the wheel, got involved in an accident where somebody was killed, and charged with a felony, you promoted him anyway?
>
> A. Yes.
>
> Q. Okay. So, in the two years after this – after this lady died and after he was charged with a felony offense, he was given two years to let him work out his criminal problems, wasn't he, without an IAD investigation, right?
>
> A. Well, yes, sir. That's true.

Perez was arrested and charged with felony assault concerning the off-duty stabbing of a man at a bar. In contrast to the treatment of the Anglo employees, Respondent *did* initiate an IAD investigation, which investigation was ordered only *after Respondent* was notified that all charges against Perez would be dismissed. (5 R 162) The IAD investigation concluded that Perez had engaged in conduct unbecoming an officer, and he was fired. The criminal charges were then dropped. *See Perez*, 395 F.3d at 209.

The EEOC investigated Perez' complaint and found that Respondent TDCJ had discriminated against him because of his race and issued a Cause Determination. (4 R 188; *Appendix D*) The EEOC noted that all four prison guards were accused of criminal offenses and only the Hispanic was fired.[2]

At the charge conference, the district court instructed the jury as follows:

> To establish discrimination by using indirect evidence in this case, the plaintiff must prove by a preponderance of the evidence that one or more *similarly situated* non-Hispanic employees who engaged in criminal activity were treated more favorably. In comparing the nature of the offense at issue and the nature of the discipline imposed, the quantity and quality of the other employees'

2. The Fifth Circuit improperly ignores the EEOC's cause finding of race discrimination. "An EEOC determination prepared by professional investigators on behalf of an impartial agency, is highly probative." *Palasota v. Haggar Clothing Co.*, 342 F.3d 569, n.13 (5th Cir. 2003).

> misconduct must be of *comparable seriousness* to the misconduct of the plaintiff.

Perez, 395 F.3d at 211-12 (emphasis supplied by the Fifth Circuit.)

Based on this instruction and the evidence presented, the jury found that TDCJ did violate Title VII by discriminating against Perez based on his race.

The Fifth Circuit reversed, finding that the district court erred in instructing the jury as to the proper legal standard for determining whether the employees to whom Perez sought to compare himself were "similarly situated." The Court reasoned that the "comparably serious" standard set forth by this Court in *McDonald* and reaffirmed in *McDonnell* was not applicable because in this case, unlike in *McDonald* and *McDonnell*, the plaintiff was comparing his conduct to that of employees involved in separate, distinct incidents.

In such cases, the Fifth Circuit concluded, the employees' conduct as well as their circumstances must be "nearly identical" in order to establish a violation of Title VII. *See Perez*, 395 F.3d at 213-14. The Court concluded that the jury instruction could have affected the outcome of the case because the distinctions proferred by TDCJ [and rejected by the jury] "while seemingly not relevant under the rubric of comparable seriousness, could be relevant to the question of whether Perez, Parma and Clover's respective circumstances were nearly identical." *Id.*

REASONS FOR GRANTING THE PETITION

I. Review is Warranted to Resolve a Conflict Regarding the Proper Legal Standard to be Applied in Title VII Disparate Treatment Cases.

A. The Circuit Courts are Split Regarding the Proper Legal Standard to be Applied in Disparate Treatment Cases.

Two appellate Courts – the Sixth, and D.C. Circuits — have joined the Fifth Circuit in adopting the "nearly identical" test for disparate discipline cases, while five Courts – the Second, Third, Fourth, Eighth and Tenth – have rejected that standard.

The Sixth and D.C. Circuits embraced the "nearly identical" standard in the cases of *Jacklyn v. Schering-Plough*, 176 F.3d 921, 929 (6th Cir. 1999) and *Neuren v. Adduci, Mastiani, Meeks & Schill*, 43 F.3d 1507 (D.C. Cir. 1995.)

The other Circuit Courts reaching the issue have remained true to this Court's standard set forth in *McDonald McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). For instance, in *Lynn v. Deaconess Med. Center-West Campus*, 160 F.3d 484, 488 (8th Cir. 1998), the Eighth Circuit reversed a summary judgment where the district judge had constricted the term "similarly situated" to mean the exact same offense. There, the district court had found that the plaintiff nurse's evidence of comparable conduct was irrelevant because the other nurses were not found sleeping on the job as he was, but were guilty of other types of

misconduct, and further because the comparator nurses had different discipline records. In rejecting this standard, the Eighth Circuit observed:

> To require that employees always have to engage in the exact same offense would result in a scenario where evidence of favorable treatment of an employee who has committed a different but more serious, perhaps even criminal offense, could never be relevant to prove discrimination. Common sense as well as our case law dictate that we reject such an approach.

See id.

The Tenth Circuit has ruled similarly to the Eighth, as have the Fourth and Third Circuits, all rejecting a requirement that the employees' misconduct and circumstances be exactly the same, identical, or of precise equivalence. *See McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1261 (10th Cir. 1988) (holding that, while United presented evidence that other employees committed different rule violations and had mitigating circumstances, the fact that these other employees did not commit the exact same offense as the plaintiff does not prohibit consideration of their testimony [citing *McDonald*]); *Moore v. City of Charlotte*, 734 F.2d 1100, 1108 n.5 (4th Cir. 1985) (requiring comparable seriousness "less than precise equivalence"); *Filippo v. Bongiovanni*, 30 F.3d 424 (3d Cir. 1994) (requiring similarly situated that is not the same as "identically situated.") The Second Circuit has ruled similarly. *See Graham v. Long Island RR*, 230 F.3d 34, 40 (2d Cir. 2001) ("[W]here a plaintiff seeks to establish the minimal prima facie case by making reference to the disparate treatment of other employees, those employees must have a

situation sufficiently similar to plaintiffs to support at least a minimal inference that the difference of treatment may be attributable to discrimination.)[3]

This split in the Circuit Courts warrants a review of this case by this Court, which has set the proper legal standard for disparate treatment cases. Review is necessary to resolve this untenable split of authority among the courts of appeals to ensure uniform enforcement of Title VII throughout the nation. "Similarly situated" is a standard that is understandable to judges and juries and true to Title VII and the opinions of this Court.

The difference in legal standards among the circuits is not a simple matter of different ways to articulate the same basic legal test. The difference has dramatic real-world consequences, as seen by the result in cases where the comparator engages in more egregious conduct than the plaintiff, as discussed by the Eighth Circuit, and where the plaintiff is employed in a unique position. Such a test would render Title VII meaningless to those who have unique jobs; i.e. jobs without any "nearly identical" comparators. Forcing a plaintiff to show more than 'similarly situated' would lead to the paradoxical situation where a plaintiff whose job responsibilities are unique to his or her position will *never* successfully establish a prima facie case (absent direct evidence of discrimination). This is because some jobs have no "nearly identical" comparators. Under such construct, an

3. Like the Fifth Circuit, the Eleventh Circuit has both embraced and rejected the "nearly identical" test. *See Silvera v. Orange Co. Sch. Bd.*, 244 F.3d 1253,1259 (11th Cir. 2001) (embracing); *Anderson v. WBMG-42*, 253 F.3d 561, 565 (11th Cir. 2001) (rejecting); *see also Maynard v. Board of Regents*, 342 F.3d 1281, 1290 (11th Cir. 2003) (acknowledging internal split.)

employer would be free to discriminate against those employees occupying "unique" positions.

In either case, finding suitable comparators under the "nearly identical" test is extremely difficult, undermining the purpose of Title VII. Ironically, the Fifth Circuit effectively concedes the significance of this difference in its opinion by stating that TDCJ's proffered justifications for its disparate treatment "while seemingly not relevant under the rubric of comparable seriousness, could be relevant to the question of whether Perez, Parma and Clover's respective circumstances were nearly identical." *See Perez*, 395 F.3d at 214.

B. The Fifth Circuit's Legal Standard Conflicts with Decisions of this Court and the Purposes of Title VII.

The Fifth Circuit's constructive legislation of a new legal standard ignores thirty years of precedent in this Court and undermines the meaning and purpose of the Title VII legislation. This Court has twice considered what must be proven in a case of disparate discipline under Title VII, and has twice held that a plaintiff need only prove "comparable seriousness" *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973). "Precise equivalence" is not required. *See McDonald*, 427 U.S. 283 n.11.

In *McDonnell Douglas*, this Court was faced with a plaintiff who was refused rehire because he illegally took the law into his own hands, disrupted traffic, and caused a work stoppage. Rather than require the Plaintiff to show the

misconduct was "nearly identical," this Court held that the misconduct must be of "comparable seriousness."

> [An employer] may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.

Id. at 804.

Although it may be facially appealing to feel that since Perez engaged in bad acts, he is not worthy of relief, in both *McDonald* and *McDonnell*, this Court held that racially motivated discipline contravenes Title VII despite the plaintiff having engaged in bad acts. In *McDonald*, for instance, the plaintiffs were thieves. Painting the plaintiff as a "bad' person, then, is simply no defense to racial discrimination.

The Fifth Circuit's opinion diverts from the holdings in *McDonald* and *McDonnell* by applying an overly restrictive legal standard of "nearly identical" conduct and circumstances; one that makes it virtually impossible to find appropriate comparators and thus undermines enforcement of Title VII.

The Court's attempt to distinguish *McDonald* and *McDonnell* based on whether the employees are involved in the "same" incident or separate, unrelated incidents, makes no sense. Individuals can participate in even the same act of misconduct in many different ways, each with a varying degree of culpability (for instance, the robber as opposed to his "look out," both charged and convicted of the same crime). In this case, all parties agreed the Anglo employees' misconduct were comparably serious, and the Fifth Circuit's opinion appears to concede this as well. *See Perez*, 395 F.3d at 214-215.

The comparator's crimes were arguably even more serious than was Perez's, yet this cannot be considered under the Fifth Circuit's "nearly identical" test.

The crux of this case was the Warden's attempt to explain the special treatment given to the Anglo employees. It was for the jury as the fact finder to determine whether the plaintiff and the comparators were "similarly situated" or not. The Fifth Circuit notes the Warden's difficulties in explaining his reasoning for the disparate treatment in its rejection of Perez's Rule 50 issue. Yet the jury's rejection of his explanation *alone* is sufficient for the jury to find race discrimination, regardless of whether the circumstances of the four men were "nearly identical" or not. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 135, 120 S. Ct. 2097, 2102, 147 L. Ed. 2d 105 (2000); *Desert Palace, Inc. v. Acosta*, 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003).

The Fifth Circuit's's superimposing a "nearly identical" test in the jury charge is not only in conflict with this Court's opinions, it is in conflict with Title VII. This construct would undermine the remedial purpose of the anti-discrimination statutes. Title VII will be relegated to irrelevance if a plaintiff must prove that his misconduct was "nearly identical" to individuals of another race who suffered no discipline, and that the circumstances surrounding the firing were also "nearly identical." There are probably very few, if any, situations where both the misconduct and the employee's situation would be "nearly identical," thus demonstrating the almost impossible burden plaintiffs would be required to overcome under this test. This clearly was not the purpose of Title VII.

This Court has always affirmed Title VII's meaning under the law, and has never superimposed the "nearly identical" standard. On the contrary, this Court has held, plainly, that the matters be of "comparable seriousness," not "precisely equivalent." The Circuit Courts are in disarray on this question such that Title VII is not being uniformly enforced. This case should be reviewed by this Court and upon consideration, the split of authority resolved, and the Fifth Circuit's opinion reversed.

CONCLUSION

Because of the important circuit split and the varying standards of proof under Title VII, Petitioner respectfully requests that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED DECEMBER 21, 2004

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 03-50985

JAVIER PEREZ,

Plaintiff-Appellee,

versus

TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

Defendant-Appellant

Appeal from the United States District Court for the Western District of Texas

Before SMITH and GARZA, Circuit Judges, and VANCE*, District Judge.

EMILIO M. GARZA, Circuit Judge:

A jury returned a verdict in favor of Javier Perez in his employment discrimination action against his former employer, the Texas Department of Criminal Justice

* District Judge of the Eastern District of Louisiana, sitting by designation.

("TDCJ"). Claiming that the district court erroneously excluded evidence, misinstructed the jury and improperly denied its motion for judgment as a matter of law, TDCJ appeals.

Perez was a lieutenant at the TDCJ's Connally Unit. In August, 1996 Perez was arrested and charged with felony assault for the off-duty stabbing of a fellow patron of Little Joe's Bar in Victoria, Texas. The victim, Santiago Ramos, was a former inmate at the Connally Unit.

Shortly after the stabbing incident Perez informed his supervisor, Warden Dayton Poppell, of his arrest. Despite a *Garrity* warning, however, Perez refused to discuss the incident except to proclaim his innocence.[1] After cautioning Perez that agency policy required that he give a statement and that failure to cooperate could result in disciplinary action, Poppell referred the matter to Internal Affairs for investigation.[2] The resultant Internal Affairs report (the "IA Report") concluded that Perez had violated agency rules by engaging in conduct that jeopardized the integrity of the agency. Under agency guidelines, such a finding required a termination recommendation. After reviewing the IA Report

---

1. Under *Garrity v. New Jersey,* 385 U.S. 493, 497 (1967), statements made by a police officer under threat of termination generally cannot be used against him in a subsequent criminal trial. *See also Gulden v. McCorkle,* 680 F.2d 1070, 1073 (5th Cir.1982) (statements compelled by threat of termination cannot be used in subsequent criminal trial).

2. The Internal Affairs Division is an independent investigative arm of the Texas Board of Criminal Justice.

and conducting a disciplinary hearing in which Perez, on advise of counsel, again refused to discuss the stabbing incident, Poppell recommended termination. Perez was discharged.[3] The criminal charges against Perez were later dismissed, apparently because Ramos would not cooperate.

Perez brought a claim under Title VII of the Civil Rights Act of 1964, which makes it unlawful for an employer to discharge an employee because of his race. *See* 42 U.S.C. § 2000e-2(a). Perez's claim relied primarily on a disparate treatment theory; he claimed that TDCJ had treated him more harshly than similarly situated non-Hispanic employees. *See Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 220 (5th Cir.2001) (explaining that an employee may rebut a non-discriminatory explanation for termination with evidence of disparate treatment of *similarly situated* employees). The jury agreed with Perez, finding that TDCJ had discriminated against Perez because of his race.

On appeal, TDCJ contends that the district court erred in: (1) excluding certain evidence relating to Perez's involvement in the stabbing; (2) misinstructing the jury on the standard for determining whether TDCJ treated Perez more harshly than similarly-situated non-Hispanic employees; and (3) denying TDCJ's renewed motion for judgment as a matter of law ("JMOL"). We consider the issues in the order they presented themselves at trial, beginning with the district court's evidentiary rulings.

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3. Perez's father, a fellow corrections officer at the Connally Unit, was also arrested for the stabbing incident and terminated by TDCJ. He is not, however, a party to this case.

Appendix A

I

TDCJ argues that the district court erred in (1) prohibiting cross-examination of Perez about his guilt in the underlying stabbing and (2) excluding the contents of the IA report that prompted the termination recommendation.[4] "The trial court's discretion to admit or exclude evidence is generally broad, but competent evidence cannot be excluded without a sound and acceptable reason." *Davidson Oil Country Supply Co. v. Klockner, Inc.*, 908 F.2d 1238, 1245 (5th Cir.1990). We review the trial court's evidentiary rulings only for abuse of discretion. *Kelly v. Boeing Petroleum Servs.*, 61 F.3d 350, 356 (5th Cir.1995). An erroneous evidentiary ruling is reversible error only if the ruling affects a party's substantial rights. *Id.* at 361.

The district court permitted TDCJ to cross-examine Perez about his arrest, his call to Poppell after the arrest and his refusal, on advise of counsel, to discuss the incident with either Poppell or the Internal Affairs investigator. But, the district court prohibited TDCJ from questioning Perez about his actual involvement in the stabbing, sustaining Perez's objection that what happened at Little Joe's Bar was irrelevant. TDCJ argues that the district court erred in so limiting its examination of Perez. We disagree.

---

4. While our ruling, *infra*, that the district court erroneously instructed the jury requires that we vacate the judgment, we nevertheless address the evidentiary issues because they are likely to present themselves again in any retrial of Perez's discrimination claim.

Appendix A

To be admissible, evidence must be relevant. *See* Fed. R. Evid. 401. In determining whether Perez was treated differently from similarly situated employees because of his race, the issue is whether Perez and his alleged comparator employees were similarly situated from the perspective of their employer at the time of the relevant employment decisions. *Cf. Hill v. Seaboard Coast Line R. Co.*, 767 F.2d 771, 774 (11th Cir.1985) ("[F]ailure to promote a plaintiff because the person actually promoted was more qualified is a nondiscriminatory reason, but the articulation of that reason must include the fact that the decision-maker knew that the promoted individual's qualifications were superior at the time the decision was made."); *Sabree v. United Bhd. of Carpenters and Joiners Local No. 33,* 921 F.2d 396, 404 (1st Cir.1990) (emphasizing the importance of focusing on the employers rational at the time of the decision rather than *post hoc* rationalizations). Thus, the evidence relevant to determining whether TDCJ treated Perez differently because of his race is evidence that goes to what Poppell knew at the time he ordered the IA investigation and recommended Perez's termination. Examination of Perez about what actually happened the night of the stabbing, as distinct from what he told Poppell and the IA investigator about what happened, could not have added anything relevant to that inquiry.[5] *See Patrick v. Ridge,* No. 04-10194, 2004

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5. TDCJ also argues that it should have been permitted to cross-examine Perez about his involvement in the stabbing because Perez proclaimed his innocence on the stand and the court's refusal to permit cross-examination left the jury with the impression that Perez was fired for something he did not do. In fact, Perez testified only that he *told the warden,* after his arrest, that he was innocent and had hired

(Cont'd)

WL 2898068 (5th Cir. December 15, 2004) ("As the ultimate issue is the employer's reasoning *at the moment* the questioned employment decision is made, a justification that *could not* have motivated the employer's decision is not evidence that tends to illuminate this ultimate issue and is therefore simply irrelevant. . . .") (emphasis in the original). Moreover, even if Perez's testimony about his involvement in the stabbing somehow met the low threshold for relevance, its minimal probative value would have been outweighed by the danger of confusion and prejudice. *See* Fed. R. Evid. 403.

TDCJ also appeals the district court's exclusion of the contents of the IA Report. Unlike Perez's proposed testimony, the IA Report goes to the basis for Poppell's termination recommendation and is thus relevant. *See* Fed. R. Evid. 401. The district court stated that it was excluding the report because admitting it would drag out the trial and require going into the details of each employee's criminal conduct. The court also suggested that TDCJ did not need the IA Report to show that Perez had been uncooperative because it had already introduced other testimony to that effect. We take these statements to mean that the court excluded the IA Report as cumulative and a waste of time. *See* Fed. R. Evid. 403.

(Cont'd)

a lawyer. Perez never testified at trial that he was innocent. Moreover, the jury heard testimony that Perez's guilt was never adjudicated, that the charges were dropped only because the victim disappeared and that IA investigator found sufficient evidence to believe Perez guilty. Thus, there is no support for TDCJ's argument that the jury was left with the impression that Perez was fired for something he did not do.

We need not decide whether the district court erred in excluding the contents of the IA report because, even assuming the exclusion was erroneous, we are not persuaded that the exclusion affected TDCJ's substantial rights. *See EEOC v. Manville Sales Corp.*, 27 F.3d 1089, 1093 (5th Cir.1994) (holding that to vacate a judgment based on an erroneous evidentiary ruling, the court must find that the erroneous ruling affected the substantial rights of the parties).

At trial and again on appeal, TDCJ argues that the IA Report should be admitted because it showed the basis for Poppell's termination recommendation. But the district court did admit into evidence the IA Report's conclusion that Perez's off-duty conduct undermined the integrity of the agency, which under TDCJ's own theory of the case required Poppell's termination recommendation.[6] Moreover, TDCJ points to no portion of the record in which Perez denies that, under agency policy, the IA Report's conclusion required a termination recommendation.[7] Thus, the exclusion of the IA Report's contents did not prevent TDCJ from establishing that Poppell's termination recommendation was required in light of the IA Report's conclusion. Nor was TDCJ prevented from establishing that Perez refused to cooperate with the Poppell or the IA investigator, since both Poppell and the

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6. TDCJ's states that, "[f]or a Level One violation such as Internal Affairs found, there is no other recommendation warden Poppell could have made consistent with agency policy." Appellant's Brief at 15.

7. Indeed, TDCJ states in its brief that Perez "conceded at trial that warden Poppell made the only decision he could make, given the Internal Affairs finding." Appellant's Brief at 15.

investigator testified to that effect at trial. In sum, TDCJ has not shown a reasonable likelihood that the exclusion affected its substantial rights. *See Johnson v. William C. Ellis Sons Iron Works, Inc.*, 609 F.2d 820, 823 (5th Cir.1980) (stating that "if there is a reasonable likelihood that a substantial right was affected, we should not find the error harmless.").

II

The crux of this case, however, is not the evidentiary rulings discussed in Part I, *supra,* but rather the undergirding legal standard to which that evidence must be applied. TDCJ argues that the district court misinstructed the jury on the legal standard for determining whether the employees to whom Perez sought to compare himself were in fact similarly situated. In relevant part, the trial court instructed the jury that,

> To establish discrimination by using indirect evidence in this case, the plaintiff must prove by a preponderance of the evidence that one or more *similarly situated* non-Hispanic employees who engaged in criminal activity were treated more favorably. In comparing the nature of the offense at issue and the nature of the discipline imposed, the quantity and quality of *the other employees' misconduct must be of comparable seriousness* to the misconduct of the plaintiff.

(emphasis added). TDCJ argues that the "comparable seriousness" language, without more, instructed the jury to apply too lenient a standard in determining whether the

employees being compared were similarly situated because it suggested that the jury should focus solely on the seriousness of the employees' misconduct rather than the comparability of their overall circumstances.[8]

"The district court has broad discretion in formulating the jury charge, and we therefore review [its] instructions with deference." *Deines v. Tex. Dep't of Protective and Regulatory Servs.*, 164 F.3d 277, 279 (5th Cir.1999). TDCJ must show that the instruction creates a "substantial and ineradicable doubt whether the jury [was] properly guided in its deliberations." *Id.* (quoting *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1216 (5th Cir.1995)). We will not reverse even an erroneous instruction if, upon review of the "entire record, the challenged instruction could not have affected the outcome of the case." *Id.*

The district court took the "comparable seriousness" requirement in the above quoted jury instruction from the Supreme Court's decision in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976). In *McDonald,* white and black employees were accused of stealing a shipment of antifreeze from their employer, Santa Fe Trail Transportation Co. ("Santa Fe"). *Id.* at 275. Santa Fe terminated the white employees but not the black employee. *Id.* at 275-76. In a footnote, the Supreme Court rejected Santa Fe's contention

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8. TDCJ filed a written pre-trial objection on this basis and proposed a replacement instruction. TDCJ renewed its objection at trial and the court ruled. Thus, contrary to Perez's argument on appeal, TDCJ preserved the issue for appeal. *See Taita Chem. Co. v. Westlake Styrene, LP,* 351 F.3d 663, 667 (5th Cir.2003).

that the plaintiff-white employees were required to plead with particularity the degree of similarity in culpability. The Court explained, "precise equivalence in culpability between employees is not the ultimate question: as we indicated in *McDonnell Douglas,* an allegation that other 'employees involved in acts against (the employer) of *comparable seriousness* . . . were nevertheless retained . . .' is adequate to plead an inferential case that the employer's reliance on his discharged employee's misconduct as grounds for terminating him was merely a pretext." *Id.* at 283 n.11 (quoting *McDonnell Douglas v. Green,* 411 U.S. 792, 804 (1973) (emphasis added) (ellipses in the original)).

In instructing the jury *only* that the employees' underlying misconduct must be comparably serious, the district court failed to take into account the important factual and procedural distinctions between *McDonald* and the present case. In *McDonald*, the employees in question were all participants in the same theft. *Id.* at 282. Aside from race, the only arguable distinction between them was their degree of culpability. In addressing the pleading standard under the *McDonnell Douglas* burden-shifting analysis on *McDonald's* facts, the Supreme Court did not intend to articulate, nor did it, the entirety of the plaintiff-employee's burden of proof in cases where, as here, the plaintiff-employee seeks to compare his own treatment to that of employees involved in unrelated but arguably similar misconduct.

We, however, have specifically addressed the plaintiff-employee's burden of proof in disparate treatment cases involving separate incidents of misconduct and have explained consistently that for employees to be similarly

situated those employees' circumstances, including their misconduct, must have been "nearly identical." *See Little v. Republic Ref. Co.*, 924 F.2d 93, 97 (5th Cir.1991). *See also Smith v. Wal-Mart Stores*, 891 F.2d 1177, 1180 (5th Cir.1990) (*per curiam*). In *Smith*, a Wal-Mart employee claimed that she was terminated for violating the company's fraternization policy while a male employee was not terminated for a similar violation of company policy. This court explained that "[i]n order for her claim of disparate treatment to succeed under Title VII, Smith would have to show that [the male employee] and she had been similarly situated. To this end Smith's burden is to show 'that the misconduct for which she was discharged was nearly identical to that engaged in by a male employee whom [the company] retained.'" *Id.* (quoting *Davin v. Delta Air Lines, Inc.*, 678 F.2d 567, 570 (5th Cir. Unit B 1982) (internal citation omitted) (third alteration in the original)).

In *Wyvill v. United Cos. Life Ins. Co.*, 212 F.3d 296 (5th Cir.2000) the plaintiff argued that his employer terminated him for rude and abusive conduct but did not terminate a younger employee for similar behavior. We held that in order to establish a claim of disparate treatment the plaintiff-employee had to show that he was treated differently "under 'nearly identical' circumstances." *Id.* at 304 (quoting *Little v. Republic Ref. Co.*, 924 F.2d 93, 97 (5th Cir.1991)). We then found that the striking differences between the two men's situations more than accounted for the differential treatment they had received. *Id.* at 305.

Likewise, in *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086 (5th Cir.1995) we explained that a black plaintiff-

employee claiming disparate treatment of white employees had to show that the white employees were treated differently "under circumstances 'nearly identical' to his." *Id.* at 1090 (quoting *Little v. Republic Ref. Co.*, 924 F.2d 93, 97 (5th Cir.1991)). *See also Wallace,* 271 F.3d at 221 (summarizing our case law requiring that the comparator employees' circumstances and misconduct be "nearly identical" to that of the plaintiff-employee); *Barnes v. Yellow Freight Sys. Inc.*, 778 F.2d 1096, 1101 (5th Cir.1985) (holding that a presumption of discriminatory intent is raised for purposes of a disparate treatment claim where "a supervisor of one race treats employees of the same race more favorably than similarly situated employees of another race under circumstances that are essentially identical.").

In instructing, without more, that the employees' underlying misconduct must be comparably serious, the district court erroneously suggested that comparably serious misconduct was by itself enough to make employees similarly situated. A correctly worded instruction would have made clear that the jury must find the employees' circumstances to have been nearly identical in order to find them similarly situated.

Having found the jury instruction erroneous, we must determine whether the error could have affected the outcome of the case. *See Deines,* 164 F.3d at 279. In support of his disparate treatment claim, Perez pointed to two fellow corrections officers as comparator employees. The first, Shannon Clover ("Clover"), was a lieutenant at another TDCJ unit when he was arrested for involuntary manslaughter. Clover was driving under the influence of alcohol when he

struck another vehicle, killing the driver. He ultimately pled guilty to misdemeanor driving while intoxicated. Clover transferred to Poppell's unit after his arrest but before his guilty plea. Under agency rules, conviction of a misdemeanor is a "Level Four" violation, for which an employee may not be terminated. Clover was reprimanded and placed on probation. No Internal Affairs investigation was initiated while the charges against Clover were pending.

Perez's second comparator employee, Arlen Parma ("Parma"), and his brother were employees at another TDCJ unit when they initiated a drunken assault of their mother's boyfriend. Parma entered into a plea bargain and received deferred adjudication. Like Clover, Parma was transferred to Poppell's unit after his arrest and, like Clover, no Internal Affairs investigation of the incident was initiated while the charges against Parma were pending. At the subsequent disciplinary hearing, Poppell reprimanded Parma for conviction of a misdemeanor.

Poppell, who ordered the IA investigation and recommended that Perez be terminated, conceded at trial that Perez, Parma and Clover were accused of comparably serious crimes and that Parma and Clover were nevertheless treated more leniently than Perez. Given the jury instruction's focus on comparable seriousness and Poppell's testimony, there can be little surprise that the jury returned a verdict in favor of Perez.

Properly instructed, however, the jury could have concluded that Poppell's testimony, even if taken as conceding the seriousness issue, was not dispositive on the

question of whether the comparator employees were similarly situated. This is because TDCJ presented a number of other potentially significant distinctions between Perez, Parma and Clover's respective circumstances. Specifically, TDCJ argued that only Perez had refused to explain his actions in response to TDCJ inquiries and that only Perez was accused of assaulting an ex-inmate. Regarding the involvement of a former inmate, Poppell testified that he was concerned that an assault on an ex-inmate might suggest illegal activity within the prison.[9] These factors, TDCJ claimed, explained why an IA investigation was initiated for Perez but not Clover and Parma.[10] The need to initiate an Internal Affairs investigation in turn explained the differences in punishment, TDCJ contended, since under agency policy the IA Report's conclusion that Perez had engaged in off-duty conduct that undermined the integrity of the agency required a termination recommendation.

The distinctions proffered by TDCJ, while seemingly not relevant under the rubric of comparable seriousness, could be relevant to the question of whether Perez, Parma and Clover's respective circumstances were nearly identical. Because a jury applying the correct legal standard could have

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9. TDCJ had earlier investigated Perez for involvement in the Mexican Mafia, but IA could not substantiate the rumors that prompted the investigation.

10. TDCJ also argued that the employees worked under different supervisors at the time of their arrests and that it would have been unusual for Poppell to initiate Internal Affairs investigations of Parma and Clover when their original supervisors had not initiated investigations.

found TDCJ's proffered distinctions significant, we cannot say that the district court's instruction prohibiting their consideration could not have affected the outcome of the case.

III

Finally, TDCJ argues that the district court erred in denying its renewed JMOL motion pursuant to Fed. R. Civ. P. 50. TDCJ contends that the evidence conclusively proves that the employees' circumstances were not nearly identical and that TDCJ lacked discriminatory intent.[11]

We review the district court's denial of a renewed JMOL motion *de novo. Travis v. Bd. of Regents of Univ. of Tex. Sys.*, 122 F.3d 259, 263 (5th Cir.1997). This court must review the entire record, "drawing all reasonable inferences in favor of the nonmoving party, but making no credibility determinations or weighing any evidence." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 135 (2000). Thus, although we must review the record as a whole, we "must disregard all evidence favorable to the moving party that the jury is not required to believe." *Id.* Reviewing the record in this light, TDCJ's JMOL motion should be granted if "the facts and inferences point so strongly in favor of [TDCJ] that a rational jury could not arrive at a contrary verdict." *Waymire v. Harris County,* 86 F.3d 424, 427 (5th

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11. TDCJ also argues that it conclusively established an affirmative defense, but it waived this issue by failing to object to the absence of a jury charge. *See McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298, 306 (5th Cir.1993) (pretrial request for instructions is ordinarily insufficient to preserve error).

Cir.1996) (quoting *London v. MAC Corp. of Am.*, 44 F.3d 316, 318 (5th Cir.1995)).

Considering all evidence and construing all reasonable inferences in the light most favorable to Perez, we do not find that the facts and inferences point so strongly in favor of TDCJ that a rational jury, properly instructed, could not return a verdict in favor Perez. Poppell was at times equivocal in his testimony about the significance of the distinction between an assault on a former inmate and an assault on a member of the public. Similarly, Perez's counsel sought to impeach Poppell's testimony that Perez was less cooperative than Parma and Clover by reference to Poppell's pre-trial statements on the issue. Given the disputed testimony, we cannot say that a reasonable jury could not have found Perez, Parma and Clover similarly situated. A jury finding that Perez, Parma and Clover were treated differently despite being similarly situated could therefore find that TDCJ discriminated against Perez because of his race. *See St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 511 (1993) ("rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.") (emphasis in the original).

IV

We hold that the district court erroneously instructed the jury on the law and that this erroneous instruction could have affected the outcome of the trial. Accordingly, we VACATE the district court's judgment and REMAND the case for further proceedings consistent with this opinion.

APPENDIX B — COURT'S INSTRUCTIONS TO THE JURY, GENERAL INSTRUCTIONS OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION FILED APRIL 23, 2003

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. SA-00-CA-034-FB

JAVIER PEREZ,

Plaintiff,

vs.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE,

Defendant.

COURT'S INSTRUCTIONS TO THE JURY

GENERAL INSTRUCTIONS

Members of the Jury:

You have heard the evidence in this case. I will now instruct you on the law that you must apply. It is your duty to follow the law as I give it to you. On the other hand, you the jury are the judges of the facts. Do not consider any statement that I have made in the course of trial or make in these instructions as an indication that I have any opinion about the facts of this case.

Appendix B

After I instruct you on the law, the attorneys will have an opportunity to make their closing arguments. Statements and arguments of the attorneys are not evidence and are not instructions on the law. They are intended only to assist the jury in understanding the evidence and the parties' contentions.

Answer each question from the facts as you find them. Do not decide who you think should win and then answer the questions accordingly. Your answers and your verdict must be unanimous.

Preponderance of the Evidence:

You must answer all questions from a preponderance of the evidence. By this is meant the greater weight and degree of credible evidence before you. In other words, a preponderance of the evidence just means the amount of evidence that persuades you that a claim is more likely so than not so. In determining whether any fact has been proved by a preponderance of the evidence in the case, you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

Limited Purpose:

During the course of this trial I may have instructed you that certain testimony and/or certain exhibits were admitted into evidence for a limited purpose and I may have instructed you that you may consider some documents as evidence

against one party but not against another. You may consider such evidence only for the specific limited purposes for which it was admitted.

Credibility of Witnesses:

In determining the weight to give to the testimony of a witness, you should ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact, or whether there, was evidence that at some other time the witness said or did something, or failed to say or do something, that was different from the testimony the witness gave before you during the trial.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given the witness's testimony. An important part of your job will be making judgments about the testimony of the witnesses who testified in this case. You should decide whether you believe all or any part of what each person had to say, and how important that testimony was. In making that decision I suggest that you ask yourself a few questions: Did the person impress you as honest? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness have any relationship with either the plaintiff or the defendant? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses? These are a few of the considerations that will help you determine the accuracy of what each witness said.

Appendix B

Your job is to think about the testimony of each witness you have heard and decide how much you believe of what each witness had to say. In making up your mind and reaching a verdict, do not make any decisions simply because there were more witnesses on one side than on the other. Do not reach a conclusion on a particular point just because there were more witnesses testifying for one side on that point.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness-was not telling the truth as he or she remembers it, because people may forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was an intentional falsehood or simply an innocent lapse of memory; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

The fact that a witness has previously been convicted of a felony, or a crime involving dishonesty or false statement, is also a factor you may consider in weighing the credibility of that witness. Such a conviction does not necessarily destroy the witness's credibility, but it is one of the circumstances you may take into account in determining the weight to give to his or her testimony.

While you should consider only the evidence in this case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts that have been established by the testimony and evidence in the case.

Appendix B

The testimony of a single witness may be sufficient to prove any fact, even if a greater number of witnesses may have testified to the contrary, if after considering all the other evidence you believe that single witness.

Direct and Circumstantial Evidence:

There are two types of evidence that you may consider in properly finding the truth as to the facts in the case. One is direct evidence-such as testimony of an eyewitness. The other is indirect or circumstantial evidence—the proof of a chain of circumstances that indicates the existence or nonexistence of certain other facts. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts from a preponderance of all the evidence, both direct and circumstantial.

CLAIMS AND DEFENSES

Section 2000e-2(a) of Title 42 of the United States Code (also known as Title VII) provides that:

> It shall be an unlawful employment practice for an employer . . .
>
> (1) to . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such

> individual's race, color, religion, sex or national origin. . . .

This law applies to the Texas Department of Criminal Justice.

The plaintiff, Mr. Perez, alleges that the Texas Department of Criminal Justice discriminated against him because of his race, Hispanic, when it terminated his employment. Mr. Perez contends he was treated less favorably than similarly situated non-Hispanic employees who engaged in criminal activity. The Texas Department of Criminal Justice denies that it discriminated against Mr. Perez in the termination of his employment. The Texas Department of Criminal Justice alleges that the non-Hispanic employees who engaged in criminal activity were not similarly situated to Mr. Perez.

In order to prevail on this claim, the plaintiff, Mr. Perez, must prove by a preponderance of the evidence that the plaintiff's race, Hispanic, was a substantial or motivating factor which prompted the defendant to terminate the plaintiff's employment.

You should be mindful that the law applicable to this case requires only that an employer not discriminate against an employee because of the employee's race. So far as you are concerned in this case, an employer may discharge an employee for any other reason, good or bad, fair or unfair, and you must not second guess that decision or permit any sympathy for the employee to lead you to substitute your own judgment for that of the defendant even though you personally may not favor the action taken and would have

acted differently under the circumstances. Neither does the law require an employer to extend any special or favorable treatment to employees because of their race.

On the other hand, it is not necessary for the plaintiff to prove that the plaintiff's race was the sole or exclusive reason for the defendant's decision. It is sufficient if the plaintiff proves that race was a determinative consideration that made a difference in the defendant's decision to terminate the plaintiff's employment.

The plaintiff may be able to prove discrimination either directly or indirectly. Direct evidence would include oral or written statements showing a discriminatory motivation for the defendant's treatment of the plaintiff. Indirect or circumstantial evidence would include proof of a set of circumstances that would allow one to reasonably believe that race was a substantial or motivating factor in the defendant's decision to terminate the plaintiff's employment. To establish discrimination by using indirect evidence in this case, the plaintiff must prove by a preponderance of the evidence that one or more similarly situated non-Hispanic employees who engaged in criminal activity were treated more favorably. In comparing the nature of the offense at issue and the nature of the discipline imposed, the quantity and quality of the other employees' misconduct must be of comparable seriousness to the misconduct of the plaintiff.

Appendix B

DAMAGES

Consider Damages Only if Necessary:

If the plaintiff has proven his claim against the defendant by a preponderance of the evidence, you must determine the damages to which the plaintiff is entitled. You should not interpret the fact that I have given instructions about the plaintiff's damages as an indication in any way that I believe that the plaintiff should, or should not, win this case. It is your task first to decide whether the defendant is liable. I am instructing you on damages only so that you will have guidance in the event you decide that the defendant is liable and that the plaintiff is entitled to recover money from the defendant.

Compensatory Damages:

If you find that the defendant is liable to the plaintiff, then you must determine an amount that is fair compensation for all of the plaintiff's damages. These damages are called compensatory damages. The purpose of compensatory damages is to make the plaintiff whole—that is, to compensate the plaintiff for the damage that the plaintiff has suffered.

You may award compensatory damages only for injuries that the plaintiff proves were proximately caused by the defendant's allegedly wrongful conduct. The damages that you award must be fair compensation for all of the plaintiff's damages, no more and no less. Damages are not allowed as a punishment and cannot be imposed or increased to penalize

the defendant. You should not award compensatory damages for speculative injuries, but only for those injuries which the plaintiff has actually suffered or that the plaintiff is reasonably likely to suffer in the future.

If you decide to award compensatory damages, you should be guided by dispassionate common sense. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require that the plaintiff prove the amount of his losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

You must use sound discretion in fixing an award of damages, drawing reasonable inferences where you find them appropriate from the facts and circumstances in evidence.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence: Any other damages sustained by the plaintiff, such as out of pocket expenses.

FINAL INSTRUCTIONS

Any notes that you have taken during this trial are only aids to memory. If your memory, should differ from your notes, then you should rely on your memory and not on the notes. The notes are not evidence. A juror who has not taken notes should rely on his or her independent recollection of the evidence and should not be unduly influenced by the notes of other jurors. Notes are not entitled to any greater weight than the recollection or impression of each juror about the testimony.

Appendix B

When you retire to the jury room to deliberate, you may take this charge with you as well as exhibits which the Court has admitted into evidence. Select your presiding juror and conduct your deliberations.

If you recess during your deliberations, follow all of the instructions that the Court has given you about/on your conduct during trial. After you have reached your unanimous verdict, your presiding juror is to fill in your answers to the written questions and sign and date the verdict form. Do not reveal your answers until such time as you are discharged, unless I direct you otherwise. You must never disclose to anyone, not even to me, your numerical division on any question.

If you want to communicate with me at any time, please give a written message or question to Mr. Martinez, the courtroom security officer, who will bring it to me. I will then respond as promptly as possible either in writing or by having you brought into the courtroom so that I can address you orally. I will always first disclose to the attorneys your question and my response before I answer your question.

After you have reached a verdict, you are not required to talk with anyone about the case unless the Court orders otherwise. You may now retire to the jury room to conduct your deliberations.

April 23, 2003
Date

s/ Fred Biery
FRED BIERY
UNITED STATES DISTRICT JUDGE

Appendix B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. SA-00-CA-034-FB

JAVIER PEREZ,

Plaintiff,

vs.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE,

Defendant.

VERDICT FORM

Question No. 1:

Do you find from a preponderance of the evidence that the plaintiff's race was a substantial or motivating factor which prompted the defendant to terminate the plaintiff's employment?

Answer Yes, or No: yes

If you answered "Yes" to Question No. 1, you should-continue and, answer the remaining question.

If you answered "No" to Question No. 1, the presiding juror should sign and date the verdict form.

Appendix B

Under the law as given to you in these instructions, state the amount of compensatory damages that the plaintiff should be awarded from the defendant.

Consider the elements of damages listed below and none other.

Question No. 2:

How much, if any, do you find from a preponderance of the evidence should be awarded to the plaintiff for damages to compensate for the loss of expenses, such as out of pocket expenses?

Answer in dollars and cents, if any: $35,000.00

4-23-03
Date

s/ [illegible]
Presiding Juror

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED FEBRUARY 16, 2005

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 03-50985

JAVIER PEREZ

Plaintiff - Appellee

v.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

Defendant - Appellant

Appeal from the United States District Court for the Western District of Texas, San Antonio

ON PETITION FOR REHEARINGAND REHEARING EN BANC

(Opinion 12/21/04, 5 Cir., _____, _____ F.3d _____)

Before SMITH and GARZA, Circuit Judges, and VANCE*, District Judge.

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* District Judge of the Eastern District of Louisiana, sitting by designation.

Appendix C

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. AND 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. AND 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
United States Circuit Judge

APPENDIX D — DETERMINATION DATED APRIL 21, 1999

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
SAN ANTONIO DISTRICT OFFICE
5410 Fredericksburg Road – Suite 200
San Antonio, Texas 78229

Charge No: 360 98 0744

Javier Perez
P.O. Box 305
Bloomington, Texas 77951 — Charging Party

Texas Department of Criminal justice
3009 Hwy 30
Huntsville, Texas 77340 — Respondent

DETERMINATION

Under the authority vested in me by the Commission, I issue the following determination as to the merits of the subject charge filed under Title VII of the Civil Rights Act of 1964, as amended.

All requirements for coverage have been met. Charging Party alleged that he was discriminated against in violation of Title VII in that he was discharged because of his national origin, Hispanic.

Examination of the evidence indicates that Charging Party was discharged as he had been arrested on criminal charges. Respondent contends that discharge was the only option as

Appendix D

Charging Party violated Respondent's rule which forbids on or off duty conduct which jeopardizes the integrity of Respondent. Records indicate non-Hispanics employees have been arrested, convicted, and, in at least one incident served a sentence, for criminal charges, yet were nor discharged.

Based on this analysis, I have determined that the evidence obtained during the investigation does establish a violation of Title VII as follows: Charging Party has been discriminated against in that he was discharged because he is Hispanic.

Upon finding that there is reason to believe that violations have occurred, the Commission attempts to eliminate the alleged unlawful practices by informal methods of conciliation. Therefore, the Commission now invites the parties to join with it in reaching a just resolution of this matter.

If Respondent declines to discuss settlement or when, for any reason, a settlement acceptable to the office Director is not obtained, the Director will inform the parties and advise them of the court enforcement alternatives available to aggrieved persons and the Commission. A Commission representative will contact each party in the near future to begin conciliation.

4/21/99
Date

On Behalf of the Commission:
s/ [illegible]
Pedro Esquivel
District Director

APPENDIX E — RELEVANT STATUTE

42 U.S.C.A. § 2000e-2

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

* * * *

No. 04-1543

In the Supreme Court of the United States

JAVIER PEREZ,
Petitioner,

v.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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411 U.S. 792 (1973) 3, 9, 10

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Statute

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BRIEF IN OPPOSITION

The Court should deny Perez's petition for writ of certiorari because it fails to present an important question of federal law on which the courts of appeals conflict. The circuit split that Perez asserts is illusory. Although the courts of appeals have used different language to describe the standard for identifying proper comparator employees in Title VII cases, the substance of the underlying standard is the same in all of the circuits, leaving no conflict for the Court to resolve.

Review is also unwarranted because Perez has failed to show that the court of appeals's opinion contravenes any precedent from this Court. Indeed, the Title VII comparator standard that the court of appeals applied comports with the Court's explicit recognition that the characteristics of a proper comparator will vary based on the facts of each Title VII case, and the facts of this case fully support the court of appeals's conclusion that the district court's jury instructions on the applicable legal standard were incomplete. The alleged error that Perez identifies is mere factbound application of settled law.

Thus, each of Perez's arguments for review lacks merit. The Court has recently—and repeatedly—declined to grant certiorari on the very question that Perez presents, and no reason for reaching a different result exists here.

STATEMENT OF THE CASE

While Petitioner Javier Perez was employed as a lieutenant at a prison operated by the Correctional Institutions Division of the Texas Department of Criminal Justice (TDCJ), he was arrested for stabbing a former TDCJ inmate in a bar after work. Pet. App. 2a. Although Perez informed his supervisor at TDCJ of his arrest, he refused to discuss the incident and knowingly violated TDCJ policy by refusing to cooperate with TDCJ's investigation of his misconduct. *Ibid.* The incident was referred to the Internal Affairs division of TDCJ, which issued a report finding that Perez had

violated TDCJ rules and engaged in conduct that jeopardized TDCJ's integrity. *Ibid.* At a disciplinary hearing held after the Internal Affairs report was released, Perez again refused to discuss the stabbing incident. *Id.*, at 3a. On the recommendation of his supervisor, Perez was discharged. *Ibid.*

Perez sued TDCJ, alleging race discrimination under 42 U.S.C. §2000e. *See* R644-45. The case was tried to jury. *See* Pet. App. 17a-28a. At the close of evidence, the district court instructed the jury as follows:

> "To establish discrimination by using indirect evidence in this case, the plaintiff must prove by a preponderance of the evidence that one or more similarly situated non-Hispanic employees who engaged in criminal activity were treated more favorably. In comparing the nature of the offense at issue and the nature of the discipline imposed, the quantity and quality of the other employees' misconduct must be of comparable seriousness to the misconduct of the plaintiff." Pet. App. 23a.

Finding that race was a substantial or motivating factor that prompted TDCJ to terminate Perez's employment, the jury awarded damages against TDCJ. Pet. App. 27a-28a.

In its appeal of the district court's judgment, TDCJ asserted several arguments, including an argument that the district court improperly instructed the jury on the applicable Title VII liability standard. After rejecting many of TDCJ's arguments, Pet. App. 4a-7a, the court of appeals turned to TDCJ's assertion of error in the jury instructions. Pet. App. 8a. Guided by precedent from this Court and the Fifth Circuit, the court of appeals concluded that the district court's instructions were erroneous because they suggested to the jury "that comparably serious misconduct was by itself enough to make employees similarly situated" for purposes of Title

VII. Pet. App. 9a-12a. After noting several relevant distinctions between Perez's situation and those of the comparator employees, the court of appeals explained that "a jury applying the correct legal standard could have found [the] proffered distinctions significant"—and, accordingly, returned a verdict for TDCJ. Pet. App. 14a-15a.

Finally, the court of appeals rejected TDCJ's argument that the evidence entitled it to judgment as a matter of law, finding that the ultimate issue of Title VII liability was one that a properly instructed jury should decide. Pet. App. 15a-16a. Accordingly, the court of appeals vacated the district court's judgment and remanded the case for further proceedings. Pet. App. 16a.

REASONS TO DENY THE PETITION

Perez asserts a circuit split concerning the proper legal standard applicable in disparate-treatment cases under Title VII. Pet. 6-9. He further asserts that the court of appeals's decision, in concluding that the district court's jury instructions on this standard were erroneous, deviates from the Court's decisions in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Pet. 9-12. Each of these arguments is meritless.

Although the cases that Perez cites reveal that different circuits label the relevant Title VII standard differently, they also reflect that the substance of the underlying standard is the same. And Perez's argument that the court of appeals's decision conflicts with *McDonald* and *McDonnell Douglas* ignores the unique facts of this case. Finally, the Court has repeatedly declined to grant review of the same question presented, and Perez provides no persuasive reason for the Court to change course.

I. THE ALLEGED CIRCUIT SPLIT IS ILLUSORY.

Perez asserts that three circuits have adopted, and five circuits have rejected, "the 'nearly identical' test for disparate discipline cases." Pet. 6. In reality, all of the decisions that Perez cites apply the same fundamental standard.

A. Some Circuits Use "Nearly Identical" As Shorthand for the Applicable Title VII Standard.

The first case that Perez claims aligns with the court of appeals's purported minority position explains that the relevant inquiry is whether "all of the *relevant* aspects of [the plaintiff's] employment situation were 'nearly identical' to those of the [comparator's] employment situation." *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 929 (CA6 1999) (emphasis in original) (citing *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (CA6 1998), and quoting *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 (CA6 1994)). The second case that Perez cites as falling on the same side of the alleged circuit split similarly provides that the plaintiff "was required to demonstrate that *all of the relevant* aspects of her employment situation were 'nearly identical' to those of the [comparator]." *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1514 (CADC 1995) (emphasis added).

Despite their use of the phrase "nearly identical," the courts of appeals in both *Jacklyn* and *Neuren* based their conclusions on a paucity of evidence that the plaintiff and the comparators were *similarly situated* in all relevant respects. The *Jacklyn* court noted that the plaintiff's "broad[] assert[ion]" of several vague and immaterial similarities between herself and a male comparator constituted "no evidence from which a reasonable juror could conclude [that the comparator] was similarly situated to [the] plaintiff in all relevant aspects of their employment situations." 176 F.3d, at 929. And the *Neuren* court likewise highlighted evidence

that the employer's criticisms of the plaintiff were fundamentally different—in both type and severity—from its criticisms of the comparator employee, leading the court to conclude that the comparator was not "similarly situated" to the plaintiff. 43 F.3d, at 1514.

In short, the *Jacklyn* and *Neuren* courts' application of the relevant Title VII standard aligns with the court of appeals's decision, which noted that proper jury instructions would have explained that Perez needed to show that the comparators were situated similarly to him in all relevant aspects, rather than merely that the unspecified "misconduct" that they engaged in was of comparable seriousness to Perez's. Pet. App. 10a-12a. As explained below in Part II, Perez's quibble is merely with factbound application of settled law; the court of appeals's criticism of the district court's jury instructions was based on the particular facts of this case, in which none of Perez's comparators assaulted a former prison inmate or refused to comply with TDCJ's investigation of their underlying misconduct. Pet. App. 12a-14a. The court of appeals appropriately took these facts into account when considering whether the district court's instructions on the applicable law would permit jurors to make the proper, and complete, Title VII inquiry. Pet. App. 12a-14a; *see also* Pet. App. 5a (explaining that the issue for the jury to decide was "whether Perez and his alleged comparator employees were similarly situated from the perspective of their employer at the time of the relevant employment decisions").

Again, although the court of appeals used the phrase "nearly identical," the standard underlying that label—and the standard on which the court of appeals held that the district court should have more fully instructed the jury—is, in substance, the same "similarly situated" standard applied in *Jacklyn* and *Neuren*. And contrary to Perez's argument, that standard is also the same one applied in all

of the court of appeals' decisions that Perez claims articulate a substantively different test.

B. The Circuits That Perez Claims Represent the Majority Position Uphold the Same Substantive Standard That the Court of Appeals Applied.

Although the court in *Lynn v. Deaconess Medical Center–West Campus* states that "[t]o show that employees are similarly situated, a plaintiff need only establish that he or she was treated differently than other employees whose violations were of 'comparable seriousness,'" 160 F.3d 484, 488 (CA8 1998) (cited at Pet. 6-7), the decision also explains that the plaintiff nevertheless "ha[d] the burden of proving that he and the disparately treated female nurses were '*similarly situated in all relevant respects*.'" *Id.*, at 487 (quoting *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 972 (CA8 1994) (emphasis added)); *see also Graham v. Long Island R.R.*, 230 F.3d 34, 40 (CA2 2000) (stating that a Title VII plaintiff "must show she was 'similarly situated in all material respects'" to her comparators) (cited at Pet. 7) (quoting *Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 64 (CA2 1997)). Examining these cases demonstrates that the *substance* of the relevant Title VII standard, variously labeled though it may be, is the same.

Several of the cases that Perez cites appropriately reject the proposition that a Title VII plaintiff must show that the facts and circumstances of his case are *identical* to the comparator's. *Graham*, 230 F.3d at 40; *San Filippo v. Bongiovanni*, 30 F.3d 424, 433 (CA3 1994); *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1261 (CA10 1988); *Moore v. City of Charlotte*, 754 F.2d 1100, 1108 n.5 (CA4 1985) (all cited at Pet. 7). But Perez does not argue that any circuit requires pure identity between the plaintiff's circumstances and the comparator's, and as shown above in Part I.A, the court of appeals's "nearly identical" label does not make

the underlying standard deviate from the one that other courts have described with the word "similar."

Perez's own argument illustrates this point. Perez cites *Silvera v. Orange County School Board*, 244 F.3d 1253 (CA11 2001), as one of the cases that embraces the "nearly identical" standard. Pet. 8 & n.3. But in explaining what this standard requires, the *Silvera* court notes that a Title VII plaintiff must "show that he is *similarly situated in all relevant aspects* to the non-minority employee." 244 F.3d, at 1259 (emphasis added). It cannot credibly be argued that the *Silvera* court's articulation of the standard as "similarly situated in all relevant aspects," *ibid.*, deviates substantively from the *Jacklyn* court's "similarly situated to [the] plaintiff in all relevant aspects of their employment situations," 176 F.3d, at 929, or the court of appeals's "similarly situated from the perspective of their employer at the time of the relevant employment decisions." Pet. App. 5a.

Furthermore, several of the cases that Perez cites in support of his claimed circuit split fail to illuminate how other circuits would have responded to the district court's jury instructions in light of the facts of this case. In both *McAlester* and *Moore*, application of the standard was simplified by a close similarity between the relevant aspects of the plaintiff's and the comparator's circumstances. *See McAlester*, 851 F.2d, at 1261 (like the plaintiff, each comparator lied to his employer in order to obtain compensation to which he was unentitled); *Moore*, 734 F.2d, at 1108 (comparators violated the same civil-service regulations that the plaintiff breached). By contrast, the jury instructions in the present case would have allowed the jury to ignore differences between Perez and the comparators that are relevant to the ultimate Title VII question. *See infra* Part II.

Finally, Perez points to only one instance in which a court of appeals has itself suggested that the "nearly identical" articulation of the Title VII standard conflicts with the any other articulation of the standard, but that case concerns only an alleged conflict *within* the Eleventh Circuit. *Anderson v. WBMG-42*, 253 F.3d 561, 565 (CA11 2001) (citing *Alexander v. Fulton County*, 207 F.3d 1303, 1334 (CA11 2000)). Intra-circuit conflict is not grounds for granting review. *See Davis v. United States*, 417 U.S. 333, 340 (1974). Regardless, a more recent Eleventh Circuit decision suggests that the *Anderson* court—like Perez—identified a mere difference in description, not substance. *Maynard v. Bd. of Regents of the Div. of Univs. of the Fla. Dep't of Educ.*, 342 F.3d 1281, 1289-1290 (CA11 2003) (explaining that "[r]egardless of whether th[e] analysis requires 'similar' misconduct . . . or the *seemingly* more stringent 'nearly identical' misconduct," the standard was not met where the comparator was similarly situated to the plaintiff in some, but not all, relevant respects (emphasis added) (citations omitted)).

In sum, Perez has failed to show anything more than differing language among the circuits about how to describe the Title VII standard at issue here. The underlying standard is, in substance, the same in the Fifth, Sixth, and D.C. Circuits as it is in the circuits mentioned in Perez's petition as well as in all others that have addressed the issue. *See Brummett v. Sinclair Broad. Group, Inc.*, 414 F.3d 686, 692 (CA7 2005) (proper comparators are employees "'directly comparable to [the plaintiff] in all material respects'") (citation omitted); *Conward v. Cambridge Sch. Comm.*, 171 F.3d 12, 20 (CA1 1999) (plaintiff and comparator must closely resemble one another in respect to relevant facts and circumstances); *supra* Part I.A-B (addressing the decisions that Perez cites from the Second, Third, Fourth, Fifth, Sixth, Eighth, Tenth, Eleventh, and D.C. Circuits); *see also Patches v. City of Phoenix*, 68 Fed. Appx. 772, 774 (CA9 2003) (citing decisions from the Second and Eighth

Circuits regarding the relevant Title VII comparator standard); *Ruiz v. A.B. Chance Co.*, 234 F.3d 654, 672 (CA Fed. 2000) (affirming summary judgment on a 42 U.S.C. §1981 claim based on the Eighth Circuit's "similarly situated" standard as applied in a Title VII case).

II. In Light of the Relevant Facts, the Court of Appeals's Decision Comports with This Court's Precedent.

The district court's jury instructions must be read in the context of this case. *See McDonnell Douglas*, 411 U.S., at 802 n.13 (noting that "[t]he facts necessarily will vary in Title VII cases, and the specification above of the *prima facie* proof required from [the *McDonnell Douglas* plaintiff] is not necessarily applicable in every respect to differing factual situations"). Although Perez rejects the court of appeals's basis for distinguishing *McDonald* and *McDonnell Douglas*, Pet. 10, he fails to acknowledge a significant factual difference between both of those cases and the present one.

In *McDonnell Douglas*, the plaintiff's misconduct—physically blocking access to the manufacturing plant where he had worked—was directed against his employer. 411 U.S., at 794; *see also McDonald*, 427 U.S., at 283 n.11 (noting that proper Title VII comparators are "other 'employees involved in acts against (the employer) of comparable seriousness'") (quoting *McDonnell Douglas*, 411 U.S., at 804). Similarly, two relevant aspects of Perez's misconduct in this case were his act of violence against a former TDCJ inmate, as opposed to a third-party with no connection to TDCJ, and his refusal to cooperate with TDCJ's investigation of the assault. Pet. App. 12a-14a. By contrast, the misconduct of each of Perez's comparators was against a third party with no connection to the prison, and, unlike Perez, neither comparator resisted TDCJ's investigation of his questioned conduct. Pet. App. 12a-14a.

In focusing on the alleged similarity between the violent act that Perez committed and those that his comparators committed, Perez's argument effectively seeks alteration of the Title VII standard to require similarity with regard to only *one* relevant aspect of the plaintiff's and the comparators' circumstances. He would like "all relevant aspects" in the applicable Title VII analysis—the standard applied by all the circuits—to be viewed narrowly, from the perspective of individual victims. But the law is not so limited.

As already noted, a relevant part of Perez's misconduct was directed at TDCJ itself. Pet. App. 2a-3a, 14a (noting that Perez both refused to discuss the incident leading to his arrest with his supervisor and violated agency policy by refusing to cooperate with TDCJ's investigation of the incident). The court of appeals thus correctly determined that the district court's instructions to the jury were impermissibly incomplete. Pet. App. 10a, 14a-15a. This legal conclusion comports with the *McDonnell Douglas* Court's recognition that the requirements to show discrimination under Title VII will vary with the facts of each case, 411 U.S., at 802 n.13, and it also aligns with all the courts of appeals' recognition that a proper comparator must be similarly situated to the plaintiff in all relevant respects. *See supra* Part I. As the court of appeals concluded, the district court's charge in this case allowed the jury to find discrimination without considering potentially significant differences, from TDCJ's perspective, in the relevant aspects of Perez's and his comparators' circumstances.

Perez asserts that the court of appeals's opinion imposes a virtually insurmountable burden on plaintiffs attempting to identify comparators. Pet. 11. But this assertion depends on the erroneous conclusion that the "nearly identical" standard differs substantively from the standard that other circuits describe with the words "similarly situated," *see supra* Part I, and it ignores the

uncontroversial requirement that Title VII comparators must be situated similarly to the plaintiff in all relevant respects.[1]

In short, the alleged error that Perez identifies in the court of appeals's opinion is nothing more than the factbound application of settled law. Because the district court's instructions risked allowing the jury to accept Perez's comparators as "similarly situated" without considering the relevant question of whether they were similarly situated in all relevant respects—that is, in all respects that would have had a bearing on TDCJ's decision about what level of discipline was required in each of their circumstances—the court of appeals's decision comports with *McDonald* and *McDonnell Douglas*. Perez has therefore failed to show that the court of appeals's decision conflicts either with case law from other circuits, *see supra* Part I, or with decisions from this Court.

III. THE COURT HAS RECENTLY DECLINED TO REVIEW THE PRECISE QUESTION THAT PEREZ PRESENTS.

Last Term, the Court declined to consider the same question that Perez presents. *Burton v. Buckner Children & Family Servs., Inc.*, 104 Fed. Appx. 394 (CA5 2004), *cert. denied*, 125 S.Ct. 871 (2005) (Question Presented: "When comparator evidence is used as a form of circumstantial evidence to establish discrimination, must the comparable employee be involved in nearly identical circumstances in order for the evidence to be received and

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[1] Furthermore, contrary to Perez's argument, Pet. 11 (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), and *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003)), this is not a case in which the evidence supporting Perez's *prima facie* case also determined the issue of discrimination *vel non*. The court of appeals correctly concluded that a properly instructed jury could have found that factual distinctions between Perez's circumstances and his comparators' precluded a finding of discrimination. Pet. App. 14a-15a.

considered?"). The *Burton* petition made essentially the same argument that Perez makes in his petition, *see* 2004 WL 2326798, at *23, and the Court's denial of review in *Burton* was consistent with the Court's repeated denial of review in other similar cases.[2]

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[2] *See Murphy v. Univ. of Cincinnati*, 72 Fed. Appx. 288 (CA6 2003), *cert. denied*, 124 S. Ct. 2159 (2004) (Question Presented: "To qualify as a 'similarly situated' employee . . . in a discrimination case, must the [plaintiff's and the comparator's] positions be identical such that any variation no matter how immaterial can defeat a claim, as held by the Sixth Circuit in this case and by the Fourth and Eleventh Circuits in other decisions, or are . . . the First, Seventh, Eighth and Tenth Circuits correct in their holdings that the 'similarly situated' requirement should not be so strictly applied 'as to prevent individuals with unique jobs from ever establishing a prima facie case'?") (quoting *Murphy*, 72 Fed. Appx., at 300 (Clay, J., dissenting)); *Ratley v. City of Jacksonville*, 37 Fed. Appx. 507 (CA11 2002), *cert. denied*, 537 U.S. 885 (2002) (Question Presented: "Whether the Eleventh Circuit erred by not finding an abuse of discretion by the lower court for requiring nearly identical conduct instead of comparably serious conduct to identify Title VII comparators for purposes of establishing Petitioner's prima facie case of sex discrimination."); *Lambert v. Fulton County*, 253 F.3d 588 (CA11 2001), *cert. denied*, 122 S. Ct. 2361 (2002) (Question Presented: "Whether certiorari should be granted to resolve a conflict among the United States Courts of Appeal[s] as to the standard for proper comparators in a disparate discipline employment discrimination case?"); *Ellerbe v. Mineta*, 2 Fed. Appx. 6 (CADC 2001), *cert. denied*, 534 U.S. 895 (2001) (Question Presented: "Whether the lower courts erred in excluding relevant evidence by applying the District of Columbia Circuit's comparator standard which is more restrictive than that of other circuits?"); *Harvis v. Roadway Express, Inc.*, 111 F.3d 131 (CA6 1997), *cert. denied*, 522 U.S. 860 (1997) (Question Presented: "Where a black plaintiff alleges that he was dismissed discriminatorily . . ., is he required, in order to establish a prima facie case, or demonstrate the pretextuality of his employer's proffered justifications, to identify a non-dismissed

Nothing has changed; this case is similarly unworthy of the Court's review.

CONCLUSION

The Court should deny the petition for writ of certiorari.

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white employee whose position, situation, and work history were 'nearly identical' to his own?").

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No. 04-1543

IN THE

Supreme Court of the United States

JAVIER PEREZ,

Petitioner,

v.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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I

The State attempts to diminish the Circuit Court split in Title VII cases by arguing that "similarly situated" and "nearly identical" really mean the same thing. If these two terms meant the same thing, it could not have been error for the district court to utilize the "similarly situated" instruction. But the Fifth Circuit did find error, holding that more was required; namely that the circumstances be "nearly identical," thus disagreeing with five of its Sister Circuits.

The fact is that an ongoing circuit split exists, and the split is over substance, not form. Since the State concedes that no vehicle problems exist, this case presents this important issue head-on, and this Court should resolve it now.

The argument that the Fifth Circuit merely uses different language to describe the same standard is undermined by the fact that the State made the opposite argument to the Fifth Circuit. It convinced the appellate court that Perez had do *more* than just prove that similarly situated Anglos were treated more leniently. The State convinced the appellate court that Perez may have lost had he been required to show that he was discharged under "nearly identical" circumstances, even though he won under the "similarly situated" instruction.[1]

The State fails to even *discuss* the actual instruction submitted to the jury. Perez was required to prove "that one or more similarly situated non-Hispanics who engaged in criminal activity were treated more favorably." This whole case was tried on the State's attempts to explain its position that these Anglos were not "similarly situated." The jury

---

1. The State was probably right, since the Anglos' circumstances were arguably *worse* in that deaths and dishonesty were involved.

found disparate discipline among similarly situated prison guards, and the Fifth Circuit, like the Sixth and D.C. circuits, held that this was not enough; that more was required.

This conflict needs to be resolved because litigants in Title VII cases should not have their rights adjudicated based upon the fortuitousness of the circuit in which they find themselves. What could be more arbitrary than for Title VII plaintiffs to win or lose based on where they happen to live?

The changing of the burden of proof from "similarly situated" to "nearly identical" has real world implications, as evidenced by the result in this very case. Given this usurpation of Title VII, this Court should grant the petition, resolve the split and clear up this critical attack on Title VII.

REASONS FOR GRANTING THE PETITION

I. The Circuit Court Split is Real.

A. The State's Attempt to Diminish Important Distinctions In Legal Standards by Labeling them "Shorthand" is Unpersuasive.

In an attempt to gloss over the split, the State states that "different circuits label the Title VII standard differently." These different "labels" are in reality matters of substance, not form. The circuit courts which have resisted the invitation to change the burden of proof have explained in pointed terms how this different standard would render Title VII inoperative. If the "nearly identical" test were applied, then when a Hispanic commits misconduct *less serious* than an Anglo's misconduct and the Hispanic is fired while the Anglo is retained, the employer would escape liability because the

circumstances were not "nearly identical." Or, if an employee is in a unique employment position, the employer again would escape liability for race discrimination because there could be no comparator at all.

The reality is that the Circuits Courts are split in this regard, with the Fifth, Sixth and D.C. Circuits condoning this approach while the district court followed this Court's precedent and applied the correct standard. This issue is no mere "quibble". It is a conflict, pure and simple, on a critical Title VII issue.

B. The State's Argument that Most Circuits Go its Way Does Not Diminish the Circuit Split but Instead Establishes it.

The State argues that most circuits have done like the Fifth Circuit has done, and changed the burden of proof in Title VII cases. Although this argument is not supported in the Brief, it serves to demonstrate the real world split that is upsetting the Title VII world. Either "similarly situated" is the right standard, or it is not.

The State makes an unsupported declaration that the jury charge in this case "allowed the jury to ignore differences between Perez and the [Anglo] comparators." Instead, the district court's charge did just the opposite, inquiring whether the individuals were "similarly situated." Imposing a higher standard would, as this Court recognized in a *Batson* claim in *Miller-El v. Dretke,* 545 U.S. __, 125 S. Ct. 2317 (2005), render the statute "inoperable." *Id.* at 2329 n.6. The Second, Third, Fourth, Eighth and Tenth Circuits recognize this, but the Fifth, Sixth and D.C. Circuits do not.

II. The Relevant Facts Reveal the Need to Clear Up the Split.

The ultimate question for the jury was whether similarly situated Anglos who had committed misconduct were treated more leniently. The State argued hard to the jury that the Anglos were *not* similarly situated. It starts with the argument that, because Perez got into a fight with an ex-inmate, he was not similarly situated to his comparators. Unlike the jury, the State ignores the evidence that the warden who fired Perez admitted that this made no difference. *(4 R. 183-84)* Likewise, the State argues that Perez "resisted" TDCJ's investigation, while the evidence was that the warden admitted that the Anglo comparators had resisted telling the whole truth and had omitted material facts. *(4 R. 62-63, 5 R. 157-58)*

The Anglo prison guards were obviously similarly situated. One of them got drunk, got behind the wheel and killed a member of the public, then concealed his rate of speed to the State. *See Perez v. Tex. Dept. Criminal Justice,* 395 F.3d 206, 213-14 (5th Cir. 2004)(5 R 62-63) After being charged with felony intoxication manslaughter, he was *promoted. (4 R 159-60)* Then he plea-bargained the charges so that he was convicted of a lesser crime, but was never fired or even subjected to an IAD investigation like the one that led to Perez's termination. Instead, he served jail time on weekends before returning to his prison job of guarding other criminals. *(4 R 170-71)*

The other two Anglo comparators who, like Perez and Clover, were prison guards, got drunk and beat a man into submission so that he would give them money. *(4 R 144,150-51)* They broke his ribs, punctured his lungs and sent him to the hospital. When they were charged with felony assault,

they concealed to the warden that they had been drinking. *(4 R 157-58)* They plea-bargained the charges down. They did not suffer an IAD investigation like Perez and were not fired like Perez. Yet their circumstances, while arguably *worse* than Perez', were apparently not "nearly identical".

III. The State's Protests that This Court Has Received Numerous Petitions for Certiorari Only Underscores the Need to Resolve the Circuit Split.

The State is certainly right that this Court is being inundated with cases springing from the creation of evidentiary hurdles Congress never intended. This is a reason for this issue to be cleared up, not ignored. This Court is under no obligation to simply allow this to continue to fester.

Tellingly, this Court recently confronted an argument which is nearly identical to the one Respondent makes here. In *Miller-El v. Dretke*, the prosecutor had used peremptory strikes to exclude African American potential jurors while retaining Anglos. The prosecutor argued that apparently racially motivated jury strikes of African Americans were not discriminatory because the situations of the Anglos selected were not identical to that of the African Americans excluded by the prosecution. This Court, in plain terms, rejected this artifice:

> None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one. Nothing in the combination of Fields's statements about rehabilitation and his brother's history discredits our grounds for inferring that these

> purported reasons were pretextual. A per se rule that a defendant cannot win a Batson claim unless there is an exactly identical white juror would leave Batson inoperable; potential jurors are not products of a set of cookie cutters".

125 S. Ct. at 2329 n. 6

A "nearly identical" legal standard would just as clearly render Title VII inoperable. This device of ratcheting up the burden of proof in race cases has grave implications to the statute's remedial purposes. So long as the discrimination is cloaked with the claim that there are no "nearly identical" comparators, the bar is set so high that it can never be cleared. Some circuit courts have recognized the fallacy of taking of liberties with the standard, while others, like the Fifth Circuit in this case, have done the opposite. For Title VII to have the vitality Congress intended, the standard must be workable.

This strangulation of the term "similarly situated" into "nearly identical" is now having real world consequences, even to the point of courts *rendering* jury verdicts finding race discrimination. *See Bryant v. Compass Group USA, Inc.*, 413 F.3d 471 (5th Cir. 2005). The district court in that case utilized the "similarly situated" standard. The Fifth Circuit held that being similarly situated did not even create a *fact question* and therefore rendered judgment for the defendant, holding that the circumstances were not "nearly identical."

CONCLUSION

This issue should be resolved. The standard of proving race discrimination under Title VII should be uniform throughout the land, and the standard should not be one that renders the statute "inoperable." The petition should promptly be granted and the case set for argument.

Respectfully submitted,

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